

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-1042-99
PSchneiderman/GMackey

date:

to: District Director, Manhattan District
ATTN: Chief, Examination Division
(Revenue Agent William Wise)

from: District Counsel, Manhattan (CC:NER:MAN)

subject:

Form SS-10- Tax Years [REDACTED], [REDACTED] and [REDACTED]

Form 872 - Tax Years [REDACTED] and [REDACTED]

Form SS-10 - Tax Years [REDACTED] and [REDACTED]

Consent to Extend the Statute of Limitations on Assessment

STATUTE OF LIMITATIONS EXPIRES [REDACTED]

UIL Nos. 6501.08-00, 6501.08-09, 6501.08-10, 6501.08-12

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We write in response to your request for advice in the above-captioned matter. Specifically you have requested that we review the following:

1. A Form 872 (Consent to Extend the Time to Assess Income Taxes) to extend the statute of limitations on

assessment of the income tax liability of [REDACTED] for the taxable years [REDACTED] and [REDACTED] that was prepared by your office.

The completed Form 872 that you provided to us for review was prepared in accordance with the advice our office previously rendered to you. Your present request with respect to this Form 872 is that we simply review it to determine whether it was prepared in accordance with our previous advice. Based upon our review of the completed Form 872, it appears that you have indeed followed our advice and properly prepared the Form 872 in accordance therewith. Please make sure that the Form 872 is executed by the taxpayer's president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. See Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

2. Forms SS-10 (Consents to Extend the Time to Assess Employment Taxes) to extend the statute of limitations on assessment of the employment taxes of [REDACTED] for the taxable years [REDACTED] and [REDACTED] and of [REDACTED] for the taxable years [REDACTED], [REDACTED] and [REDACTED] that have been prepared by your office.

Our office has not previously reviewed these completed Forms SS-10 nor were they prepared in accordance with any advice previously rendered by our office. Our advice with respect to these Forms SS-10 is now set forth below.

Issues

1. Which entity is the proper entity to enter into a consent to extend the statute of limitations on assessment of the taxpayer's employment tax liabilities (Form SS-10) for pre-merger tax years.

2. How should such consents (Forms SS-10) be captioned.

3. Whether the corporation surviving a merger is liable as a transferee of the merged corporation with respect to its employment tax liabilities for pre-merger tax years.

Facts

[REDACTED] (" [REDACTED] ") (E.I.N. [REDACTED]),

is a Delaware corporation incorporated on [REDACTED]. [REDACTED] ("[REDACTED]") (E.I.N. [REDACTED]) is also a Delaware corporation incorporated on [REDACTED]. For the fiscal years ending [REDACTED], [REDACTED] and [REDACTED], [REDACTED] was the common parent of an affiliated group of corporations and filed consolidated U.S. Corporate Income Tax Returns (Form 1120) with its affiliates, including [REDACTED].

On [REDACTED], [REDACTED] and [REDACTED] merged. Pursuant to the Merger Agreement, [REDACTED] merged with and into [REDACTED] and ceased to exist as a separate entity. [REDACTED] emerged as the surviving corporation and became the new common parent of the consolidated group. The Merger Agreement provided that [REDACTED] was to succeed to all the assets and liabilities of [REDACTED] as of the effective date of the merger.

On [REDACTED], [REDACTED] executed a Form SS-10 with respect to [REDACTED]'s employment tax liabilities for the taxable years [REDACTED], [REDACTED] and [REDACTED] extending the statute of limitations on assessment from [REDACTED] to [REDACTED]. This consent, as currently captioned, is in the name of "[REDACTED] [REDACTED]." It was executed on behalf of [REDACTED] by [REDACTED], the assistant secretary of [REDACTED].

Also, on [REDACTED], a Form SS-10 was executed with respect to [REDACTED]'s employment tax liabilities for the tax years [REDACTED] and [REDACTED] extending the statute of limitations on assessment from [REDACTED] to [REDACTED]. The Form SS-10, as currently captioned, is in the name of "[REDACTED] [REDACTED]." It was executed on behalf of [REDACTED] by [REDACTED], the assistant secretary of [REDACTED].

A prior Form SS-10 for [REDACTED] for its [REDACTED] employment tax liabilities was executed on [REDACTED], extending the statute of limitations on assessment of employment taxes from [REDACTED] to [REDACTED]. This consent was also captioned in the name of "[REDACTED] [REDACTED]" and was executed on behalf of [REDACTED] by an officer of [REDACTED].

¹Since [REDACTED] ceased to exist on [REDACTED], presumably, the purpose of the Form SS-10 for [REDACTED] was to extend the statute of limitations of assessment of [REDACTED] employment tax liabilities for the short tax year ending [REDACTED].

Discussion

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). Section 6501(c)(4), however, provided an exception to the general three year statute of limitations on assessment. In accordance with this exception, the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations on assessment. For employment taxes, the form used by the Service to extend the limitations period on assessment is Form SS-10 (Consent to Extend the Time to Assess Employment Taxes).

Unlike the income tax liability of a consolidated group, where, as a general rule, the common parent acts as sole agent for each member of the group, each member of a consolidated group must act on its own behalf with respect to its own employment tax liabilities. See I.R.C. § 1501 and the regulations thereunder. Each member is, therefore, responsible for entering into its own consent to extend the statute of limitations with respect to its employment tax liabilities. In the case of merged corporation, the surviving or resulting corporation in a merger under state law may validly sign an extension agreement on behalf of the transferor (predecessor) corporation for a period before the transfer. Rev. Rul. 59-399, 1959-2 C.B. 499; See also Popular Library Inc. v. Commissioner, 39 T.C. 1092 (1963); Union Bleachery v. Commissioner, 97 F.2d 226 (4th Cir. 1938).

In the subject case, both [REDACTED] and [REDACTED] are Delaware corporations and merged in accordance with Delaware Law. Pursuant to the law of Delaware, "when any merger or consolidation shall have become effective ... all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it." Del. Code Ann., Title VIII, § 259(a) (1998).

Form SS-10 for [REDACTED]

[REDACTED] survived the merger and remained unchanged by the merger. [REDACTED] may, therefore, properly execute the Form SS-10 on its own behalf, in its own name, for the pre-merger years. Accordingly, we approve of the caption of the Form SS-10 that you provided to us with respect to [REDACTED]. We advised you over

the telephone, however, that we were concerned as to whether [REDACTED], the assistant secretary of [REDACTED], is the proper person to execute the consent on behalf of [REDACTED]. In response to our concern, you advised us that you would have the consent re-executed by one of the officers of the taxpayer listed in Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. As long as the consent is executed by one of the individuals identified in the Revenue Ruling, the Form SS-10 that you prepared for [REDACTED] is legally sufficient.

Form SS-10 for Holdings executed on [REDACTED]

The extension of the statute of limitations for Holdings for its [REDACTED] employment tax liabilities, which was provided to us, was captioned in the name of "[REDACTED]" It was signed on [REDACTED], in the name of [REDACTED], after [REDACTED] had ceased to exist. The consent was, therefore, captioned in the name of an entity that no longer existed and was signed in the name of an entity that no longer existed. Under the state law of Delaware, [REDACTED] became liable for the liabilities of [REDACTED] at the time of the merger, including [REDACTED]'s pre-merger employment tax liabilities. [REDACTED] was, therefore, the proper entity to execute the consent to extend the statute of limitations with respect to [REDACTED]'s [REDACTED] employment tax liabilities. (b)(7)a

(b)(7)a

(b)(7)a

[REDACTED]. To be valid, however, a Form SS-10, like a Form 872, need not be executed perfectly. The critical element is the signature of an officer of the surviving corporation, here [REDACTED]. The fact that an officer of such entity used the old name can be considered a clerical error, which should not affect the validity of the form. See Pleasanton Gravel Co. v. Commissioner, 85 T.C. 824, 854 (waiver extending time to assess tax valid on its face since failure to include the name of the taxpayer-corporation with the signature of its president constituted a mere clerical error). See also Three G Trading Corp., Transferor v. Commissioner, T.C. Memo. 1988-131 (waiver extending time to assess tax valid on its face despite being executed by officer in his individual capacity rather than as a representative of the corporation).

Furthermore, although a consent extending the time to assess taxes is not a contract, contract principles are significant because section 6501(c)(4) requires that the parties reach a written agreement concerning any extension. The term "agreement" means a manifestation of mutual assent.

Piarulle v. Commissioner, 80 T.C. 1035, 1042 (1983). It is the objective manifestation of mutual assent as evidenced by the parties' conduct that determines whether they have made an agreement. Kronish v. Commissioner, 90 T.C. 684 (1988).

(b)(7)a

(b)(7)a

(b)(7)a

Form SS-10 for [REDACTED] executed on [REDACTED]

The SS-10 that you provided to us for [REDACTED] for the [REDACTED] and [REDACTED] years was also captioned in the name of "[REDACTED]" and signed on [REDACTED] by [REDACTED]. Prior to the execution of the SS-10, however, [REDACTED] had merged with and into [REDACTED]. As a result of the merger, [REDACTED] ceased to exist. [REDACTED] survived the merger. Under the state law of Delaware, [REDACTED] became liable for the liabilities of [REDACTED] at the time of the merger, including [REDACTED]'s pre-merger employment tax liabilities. [REDACTED] is, therefore, the proper entity to execute the consent to extend the statute of limitations with respect to [REDACTED]'s pre-merger employment tax liabilities.

Caption for Form SS-10 for [REDACTED] executed on [REDACTED]

Although an improperly captioned consent for [REDACTED]'s [REDACTED] and [REDACTED] employment tax liabilities has already been

executed, we now have the opportunity to rectify this "clerical error" since the statute of limitations with respect to assessment of the employment tax liabilities does not expire until [REDACTED]. Accordingly, the caption of the Form SS-10 for [REDACTED] pre-merger employment tax liability for tax years [REDACTED] and [REDACTED] should be amended to read as follows:

"[REDACTED] (E.I.N. [REDACTED]),
as successor in interest to [REDACTED]
(E.I.N. [REDACTED])."

Transferee Liability

Section 6901(a) provides a procedure by which the Service may collect taxes from a transferee of property who is liable at law or equity for the taxes of the transferor. To establish transferee liability in equity, the Service must generally prove: (1) the taxpayer transferred property to another person; (2) at the time of the transfer the taxpayer was liable for the tax; (3) the transfer was made after the liability for the tax had accrued; (4) the transfer was made for less than full and adequate consideration; (5) the transferor was insolvent at the time of the transfer or was rendered insolvent by the transfer; and (6) the government has exhausted all reasonable efforts to collect the tax from the taxpayer. See Commissioner v. Stern, 357 U.S. 39 (1958).

Transferee liability at law, on the other hand, may be established by an agreement in which one party agrees to assume the liabilities of the other party. See Southern Pacific v. Commissioner, 84 T.C. 387, 394, later proceeding, 90 T.C. 771 (1988). If a party to the merger is a transferee at law, there is no limit to the amount of transferee liability that may accrue. A state statute, however, may also impose primary liability on that party. See id. Primary liability and transferee (secondary) liability may co-exist. See id.

As discussed above, the subject merger took place pursuant Delaware corporate law. Under the law of Delaware, the corporation that survives a merger becomes liable for all the debts and liabilities of the respective constituent corporations. Del. Corp. Law § 259(a). Accordingly, when [REDACTED] and [REDACTED] merged and [REDACTED] emerged as the surviving corporation, [REDACTED] became primarily liable for [REDACTED] pre-merger debts and liabilities, including [REDACTED] pre-merger

income and employment tax liabilities.

In addition, since [REDACTED] agreed to assume the debts and liabilities of [REDACTED] pursuant to the terms of the Merger Agreement, [REDACTED] is also liable for [REDACTED]'s pre-merger income and employment tax liabilities as a transferee. Section 6902(a) places the burden of proving transferee liability on the Service. Accordingly, [REDACTED] should execute two Forms 2045 (Transferee Agreements) acknowledging it is transferee of [REDACTED] with respect to [REDACTED]' pre-merger income tax and its pre-merger employment tax liabilities. The forms should be executed by [REDACTED]'s president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. See Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

In addition, section 6901(d) provides that the transferee liability statute can be extended by agreement. Accordingly, [REDACTED] should also execute two Forms 977 (Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax Liability Against a Transferee or Fiduciary). One for each of its transferee liabilities mentioned above. Like execution of Forms 2045, the Forms 977 should be executed by any one of those authorized to act for EIS in accordance with the above-cite Revenue Ruling.

Should you have any questions regarding this matter, please contact Paul Schneiderman or Gerard Mackey of this office at (212) 264-1595.

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By: _____
PETER J. LABELLE
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Noted:

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